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No. 87-247

In The
Supreme Court of the United States
October Term, 1987

BERNARD ARMSTRONG,

Petitioner,

vs.

CORN BELT BANK,

Respondent.

On Petition For Writ Of Certiorari To The United States Courts of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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RELEVANT STATUTES AND RULES

Section 303(a) of the Bankruptcy Code (11 U.S.C. Sec. 303(a)).

An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the Chapter under which such case is commenced.

Sec. 101(17) of the Bankruptcy Code (11 U.S.C. Sec. 101(7))

"Farmer" means person that received more than 80% of such person's gross income during the taxable year of such person immediately proceeding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person.

Sec. 101(18) of the Bankruptcy Code (11 U.S.C. Sec. 101(18))

"Farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state.

Sec. 303(b)(1), (2) of the Bankruptcy Code (11 U.S.C. Sec. 303(b)(1), (2):

(b) an involuntary case is commenced by the filing with the Bankruptcy Court of a Petition under Chapter 7 or 11 of this title—

(1) by three or more entities each of which is either a holder of a claim against such person that is not

contingent as to liability or an indenture trustee representing such a holder, if such claims aggregate at $5000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under Section 544, 545, 547, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

Sec. 303(h)(1) of the Bankruptcy Code (11 U.S.C. Sec. 303(h)(1)

(h) If the Petition is not timely controverted, the Court shall order relief against the debtor in an involuntary case under the Chapter under which the Petition was filed. Otherwise, after trial, the Court shall order relief against the debtor in an involuntary case under the Chapter under which the Petition was filed, only if

(1) The debtor is generally not paying such debtor's debts as such debts become due.

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RULES OF BANKRUPTCY PROCEDURE

Rules of Bankruptcy Procedure, Rule 8013

Disposition of Appeal; weight accorded Bankruptcy Judge's finding of fact.

On an appeal, the District Court or Bankruptcy Appellate panel may affirm, modify, or reverse a Bankruptcy Court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not

be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of the witnesses.

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STATEMENT OF THE CASE

The Corn Belt Bank, now known as BancMidwest of McLean County, N.A., and hereinafter referred to as "CBB", filed a petition seeking to have Bernard Armstrong, hereinafter called "Armstrong", declared an involuntary bankrupt pursuant to 11 USC Section 303 on March 31, 1982. On that date, Armstrong owed CBB approximately Four Hundred Ninety Three Thousand Eight Hundred Sixteen Dollars and twenty-nine cents ($493,816.29), and had also personally guaranteed an additional Four Hundred Fifty Thousand Dollars ($450,000.00) of liabilities of Armstrong Hybrid Seed Company. Armstrong Hybrid Seed Company had previously filed for bankruptcy. In the year prior to the bankruptcy petition, Armstrong had sold substantially all his farming machinery, given up farming land that he had tenant farmed for a Trust, and rented out land that he and his wife owned on a cash basis.

The land that Armstrong rented out was approximately 240 acres and he received One hundred forty five Dollars ($145.00) per acre from the tenant as his sole compensation. His sole obligation under the lease was to provide lime for the acreage at his expense.

The sale of his farm equipment in 1981 derived Twenty nine thousand five hundred Dollars ($29,500.00) in in-

come. The cash rental derived Seventeen thousand one hundred eighty one dollars and fifty cents ($17,181.50). The total income for taxable year 1981 was Ninety nine thousand ninety three Dollars ($99,093.00). No corresponding purchase of new or replacement equipment was made by Armstrong for the equipment sold.

On December 1, 1982, the Bankruptcy Court ruled that Armstrong be adjudicated a debtor under Chapter 7 of the Bankruptcy Code and further found that Armstrong was not a farmer within the meaning of the Code. The Bankruptcy Court found that of the $99,093.00 of income for taxable year 1981, $38,332.50 constituted income from a farm operation which represented only 38.68% of the total gross income for 1981. Specifically excluded from farm income was the monies derived from the sale of the equipment and the monies derived from cash rental of land.

On January 14, 1983, by agreement and stipulation of the parties, the order entered on December 1, 1982, was modified only as to the ultimate issue of whether or not Armstrong should be adjudicated a debtor. The Court specifically retained its ruling that Armstrong was not a "farmer".

On May 31, 1985, after hearing further evidence, the Bankruptcy Court concluded that Armstrong was a debtor pursuant to the Bankrupt Code; that as of the date of the filing of the petition that CBB held at least $5,000.00 in claims, not contingent as to liability or subject to bona fide dispute; that Armstrong was not generally paying his debts as those debts came due; and that portions of Armstrong's testimony were not convincing.

On June 7, 1985, Armstrong appealed the Bankruptcy Court's rulings to the District Court for the Central District of Illinois. On December 10, 1985, the District Court affirmed the Bankruptcy Court. On February 9, 1987, the United States Court of Appeals for the Seventh Circuit affirmed the lower court rulings, but found that the sale of farming equipment should have been considered as received from the farm operation. Notwithstanding that finding, it found that less than 80% of Armstrong's income was derived from farming operations. On May 14, 1987, a request for a rehearing was denied by the Appellate Court. The Appellant subsequently caused a Petition for a Writ to be docketed in this Court.

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REASONS TO AFFIRM THIS APPEAL

The Petitioner is not a Farmer as Defined in the Bankruptcy Act

The decision of the Seventh Circuit Court of Appeals should be affirmed by summary disposition because the decision concerning Armstrong not being a farmer pursuant to the definition set out in the Bankruptcy Code was correct. The finding of the Seventh Circuit that Armstrong failed to pay his bills as they came due and had an indebtedness in excess of Five thousand Dollars ($5,000.00), owing to CBB is also correct. There is no showing that the decision of the Seventh Circuit is inconsistent with the decision of any other Federal Court of Appeals or that the question decided by that Appellate Court was of such an important nature as to create an important

question of Federal Law which should be decided by this Court.

All three courts have determined that Armstrong was not a "farmer" as a farmer is defined by the Bankruptcy Act of 1978, as amended. In determining whether or not Armstrong was a farmer, the only question before the court was whether Armstrong derived 80% or more of his gross income from farming operations during calendar year 1981. (11 U.S.C. Sec. 101 (17), 11 U.S.C. Sec. 101 (18). The question of what his intent was or what his past history might have been or what the future promised is not a relevant issue for the Court to determine. *Potmesil v. Alexandria Production Credit Association,* 42 B. R. 731, (DC 1984) The Appellate Court found that Armstrong's gross income for calendar year 1981 was $99,093.00. Of that figure Armstrong received $17,181.50 as rental income from the rental of a 240 acre farm owned by Armstrong and his wife. The burden of showing that the lower Court's findings are clearly erroneous fall upon the shoulders of the party seeking a reversal of those findings. The mere fact that one can show that the Court could have reached another conclusion on the evidence presented, is not sufficient to cause a reversal. *In Re Huntington Ltd.,* 654 F.2d 578 (Ninth Circuit 1981)

In general the legislative history of 11 U.S.C., Section 303 (a) speaks of farmers as entities excepted from being placed in involuntary bankruptcy because of the reciprocal nature of their business. "One drought year, or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy." *See Senate Report*

#95-989 as found in the Historical and Revision notes of Title 11. Clearly the method used by Armstrong to rent the land on a cash basis, free of any of the dangers referred to by the Legislature lends credence to the finding that that income is not farm income.

The matter of rented farms does not seem to be specifically addressed by the Legislative history of the Bankruptcy Act of 1978. Yet, *9 Am. Jur. 2nd Bankruptcy, Sec. 226, page 395,* cites a number of cases decided under previous acts and reviews the concept of rental land and its association with the definition of a farmer. It is clear from an examination of this treatise that the concept of risk and the concept of the rental of land as opposed to the concept of the farming of land were principles that the Bankruptcy Act had long dealt with. Indeed, the Legislative history of the 1978 Act, in noting the vagaries of the farmers economics, speaks to the question of risk and does not indicate any intent to change this concept.

In the arrangement that Armstrong had with his tenant, he was clearly not exposed to the irregular nature of farming and the fluctuation of income based on weather, crop production and price fluctuation. It was because of these conditions that the Legislature instituted a different test for an involuntary petition against a farmer. See *H. R. Doc. #93-137, 93rd Cong. 1st Sess. pt 1 at 224 (1973)* See also *In Re Hines, 7 B. R. 415 (Bnkruptcy, D. S. D. 1980)*

Because Armstrong was required to provide no labor, because Armstrong was not dependent on the yield from the land rented, and because Armstrong's income was fixed prior to the planting of any crops, the income derived from the renting of land cannot be considered incident to a farming operation as defined by statute and Armstrong is not

entitled to the farmer's exemption found at 11 U.S.C. Sec. 303(a).

THE PETITIONER WAS NOT MEETING HIS DEBTS AS THEY BECAME DUE?

A second test in determining whether or not an individual may fall within the involuntary provisions of the Code, is whether or not the debtor is meeting his debts as they come due. This issue is predominantly a question of fact. It is undisputed that Armstrong signed notes in his individual capacity in the amount of $493,816.29 plus accrued interest. It is also undisputed that Armstrong never made any payments on said notes, that he never offered to make any payments on said notes, and that the same were due according to their terms and that the same were not paid at the time of the filing of the involuntary bankruptcy. Further, the evidence is uncontradicted that Armstrong guaranteed $450,000.00 worth of indebtedness of Armstrong Hybrid Seed Company which had previously filed bankruptcy. The Bankruptcy Court found unconvincing Armstrong's testimony that he didn't know what he was doing when he signed the guarantees. As stated in *In Re Huntington, Ltd.* 654 F 2d 578 (Ninth Circuit 1981), the burden is upon Armstrong to show that the findings of the Bankruptcy Court, the District Court, and the Appellate Court were clearly erroneous and Armstrong has failed to convince any of these Courts as to the impropriety in the taking of the guarantees.

The guarantees in question under Illinois law would be termed absolute as opposed to conditional guarantees or guarantees of collectibility. See *Illinois Law and Practice Vol. 20, Guarantee Sec. 44.* With Armstrong having failed to establish any evidence that he was capable of paying the

$493,000.00 in notes that he had personally signed and with Armstrong having failed to show that he was not obligated on the $450,000.000 guarantee of a note to a corporation which was in bankruptcy, it is inconceivable to argue that any of the lower courts were not correct in finding that Armstrong was not paying his debts as they came due.

It is interesting to note that the Appellate Court although noting that Armstrong would not be entitled to the protections of the new Chapter 12 provisions of 11 USC, found that even if the petition were filed post Chapter 12, Armstrong would not fall within the criteria of a "family farmer with regular income."

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CONCLUSION

In summation this appeal should be summarily affirmed, because the decision of the Seventh Circuit Court of Appeals upholding the decision of the Bankruptcy Court and the District Court was correct; the questions raised by the petitioner are so unsubstantial as not to need further argument.

For the above and foregoing reasons, the Petition for a Writ of Certiorari should be summarily denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS
Office of
Bankruptcy Judge

SPRINGFIELD, ILLINOIS 62705

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In Re: BERNARD ARMSTRONG
Bankruptcy No. 382-00487

OPINION AND ORDER

(Filed May 31, 1985)

On March 31, 1982, a Petition for Involuntary Bankruptcy was filed against Bernard Armstrong. As the Court understood that the only issue for the decision was whether or not Bernard Armstrong was a farmer, an Opinion and Order finding Bernard Armstrong a non-farmer and adjudicating him a Chapter 7 debtor was entered on December 1, 1982. An Order requiring Armstrong to file schedules was entered the same day.

Petitioning creditor Corn Belt Bank, now known as Bank Midwest of McLean County (the bank), and Bernard Armstrong signed a Stipulation and Agreement to *Partially* Vacate the December 1, 1982 Order on January 14, 1983. (emphasis supplied) They agreed that the issue of wheth-

er or not Armstrong was a debtor was still to be decided. Hence, the December 1, 1982 Opinion and Order was "amended and vacated regarding the issue, finding or adjudication of Bernard Armstrong as a Debtor . . ." The Order to file schedules was entirely vacated. The Court's decision concerning Armstrong as a non-farmer remained standing as part of the original Opinion and Order.

The only issues necessary for resolution are: whether or not the bank holds at least $5,000 in claims not contingent as to liability, or subject to a bona fide dispute (Section 303(b) (2)); and whether or not Armstrong was generally not paying his debts as those debts became due unless, again, the debts are subject of a bona fide dispute. (Section 303(h) (1))

Evidence was heard in open Court. The following are the Court's findings of fact: Bernard Armstrong owed the bank $493,816.29 as of the date of the filing of the Petition herein on various loans which he signed individually. This amount may be greater as not all interest was calculated therein. Having personally guaranteed $450,000 of a $453,911.62 Armstrong Hybrid Seed Company loan, Bernard Armstrong also owed the bank to the extent of the guarantee. The bank presented a series of notes, clear and unequivocal on face that were signed by Bernard Armstrong. Whatever potential use was made of this money, Bernard Armstrong made himself responsible for the repayment. Further, the guarantees were equally clear and unequivocal.

Armstrong is not convincing when he suggests that the bank was forcing him to borrow money or that a bank officer tricked him into signing the notes individually. Mr. Armstrong had for a long time been signing notes for farm

loans. He knew that he would be responsible for the notes. Significantly, on the notes for which the company was responsible he signed differently, to wit: "Armstrong Hybrid Seed, by Bernard Armstrong, not individually . . ." As Bernard Armstrong has not offered any convincing evidence to rebut the bank's clear showing of debt due individually and by way of guarantee, the Court finds that there is no bona fide dispute about the debts.

Lastly, the Court finds that Bernard Armstrong was not meeting the debts as they came due. Armstrong had little more than 100 acres in his own name at the time of the filing and was not current on the payments on the notes. Again, Bernard Armstrong offered no evidence to the contrary. Indeed, he admitted that he could not have repaid close to one million dollars in debt. (February transcript, page 40)

The Court has already determined that Bernard Armstrong is not a farmer. No appeal was taken of the part of the December 1, 1982 Order not vacated, i.e. that Armstrong does not meet the test for a farmer. Incidentally, the Court has not heard any evidence at trial to cause it to change its original Opinion.

With no other issues of law remaining, the Court concludes that Bernard Armstrong may be a debtor under Chapter 7 of the Bankruptcy Code. (11 USC §§ 701 et seq.)

Therefore, on this the 31st day of May, 1985, an Order for Relief under Chapter 7 of the Bankruptcy Code is hereby entered against Bernard Armstrong.

/s/ Basil H. Coutrakon
Bankruptcy Judge

BHC:cf